IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1169

JAMES C. GABRIEL, *Pro Se* a CLASS B STOCKHOLDER in MISSOURI PACIFIC RAILROAD COMPANY, for himself,

Petitioner Pro Se,

—v.—

BETTY LEVIN, on behalf of herself and all other holders of CLASS B COMMON STOCK of MISSOURI PACIFIC RAILROAD COMPANY, and on behalf of said corporation, and ROBERT LE VASSEUR and ALLEGHANY CORPORATION,

Plaintiffs-Appellees,

—against—

MISSISSIPPI RIVER CORPORATION, MISSOURI PACIFIC RAILROAD COMPANY, ROBERT H. CRAFT, T. C. DAVIS and THOMAS MILBANK,

Defendants-Appellees.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Opening Statement

Petitioner-Appellant James C. Gabriel, *pro se,* on behalf of himself alone, seeks a Writ of Certiorari to review a certain judgment of the United States Court of Appeals

for the Second Circuit, rendered and entered on the 18th of November 1975, affirming certain orders and judgments of the Federal District Court, S.D.N.Y. from which orders and judgment, petitioner had appealed.

Opinions Below

The judgment of the 2nd Circuit Court of Appeals appears on page A1, which Judgment as far as appellant knows, lacks an official reported citation.

The basic opinions of the District Court are as follows: (1) the opinion of March 19, 1973, reported 59 F.R.D. 353, whereby the Federal District Court approved and ordered a recapitalization of Missouri Pacific Railroad Company (MoPac); and (2) the opinion and judgment setting fees for the so called Class Action dated June 26, 1974 and reported as 377 F. Supp. 926.

The judgment of the Southern District Court denying petitioner's motion, dated March 19, 1975 and filed March 21, 1975, appears on page A3 of this petition.

Jurisdiction

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1), the Judgment of the 2nd Circuit Court of Appeals having been rendered and entered November 18, 1975.

Questions Presented

The purpose and effect of the "plan of recapitalization" is to destroy the equity bearing Class B's Common shares earnings and liquidation rights, and enrich the stockholders of the Class A $5 preferred $100 limited value stocks to a value of $430 per share as an equity stock.

This "plan of recapitalization" was concocted by the Class A $5 preferred management which is Mississippi River Corporation (the same Mississippi River Fuel Corporation which in the October Term 1966, Case No. 359, Alleghany Corporation v. Mississippi River Fuel Corporation, Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit, tried to merge MoPac and the Texas and Pacific Railway, which would have handed over to the Class A $5 preferred stockholders an unrestricted 98% participation in equity, and would have eliminated the full participation in residual equity which the Commission granted to the Class B stock and leave its equity participation permanently frozen at 2%. Fortunately, the United States Supreme Court heard the case and decided in favor of Class B. This "plan" of recapitalization transfers over $615 million from the Class B's values to the Class A $5 preferred, and thus shrinks the Class B equity bearing common value from $894 million to about $279 million, all at the expense of Class B, without any right given to appellant by the U. S. District Court in Foley Square (1967, CIV. 5059 (E.W.)) to allow me, a Class B dissenter, who voted all of his Class B shares against the MoPac "plan of recapitalization" at the Special Stockholders Meeting, held on June 15, 1973, the District Court below not giving me the right to have my Class B shares evaluated under due process of law to find their true values according to my rights secured to me by the Constitution and laws of the United States, the Hon. Court stating to me the following: "But I am giving notice to you now, and notice to any other applicant, that a similar application will be denied because there is no substance to it, and will be denied with the imposition of substantial costs." 3/19/75

Petitioners Motion is Hereby Denied. So Ordered EDWARD WEINFELD, U.S.D.J. FILED MAR. 21, 1975.

I had asked the Honorable U. S. District Court a due process of law evaluation of my Class B shares according to the I.C.C. MoPac "agreed system plan" of 1954-1955, 290 I.C.C. 477, law, which gives the fully compensated Class A $5 preferred stocks a $100 per share value, and the Class B equity bearing Common stocks "only a small amount in actual par value, but to make it the residuary beneficiary of any future prosperity the property may enjoy." The Class B became the equity bearer, which at December 31, 1972 had $349,192,000 Retained Income, and $545 million consolidated nondepreciable properties (including land and land rights or mineral rights in coal, oil, gas, etc., on over 5 million acres of lands, properties stated at estimated original cost, primarily determined as of January 1, 1955, by the I.C.C. valuations. These properties are worth many times more than that on account of the fuel crises and monetary inflation) or a total of over $894 million, or over $22,500 value per Class B for its 39,731 shares of Class B, rather than the $2,450 value allocated for each of my Class B as "fair value" by the U. S. District Court in the "plan of recapitalization." That Hon. U. S. D. Court does not give me the right for a due process of law evaluation—it calls my request as "frivolous." But as a Class B stockholder dissenter who voted against this so called "plan of recapitalization," I have a constitutional right to due process of law evaluation of my Class B shares. I want a due process of law evaluation of my Class B.

It is undisputed that such a "plan of recapitalization" would destroy my Class B common stock equity position

and earnings and it hands over to the Class A $5 preferred stock 74½% of the MoPac equity from Class A's former 17½% equity, and it reduces the value of my Class B from 82½% to 25½%, or from a value of over $22,500 per Class B to $2,450 value per Class B, or from a value for Class B of $894 million for its 39,731 shares before the "plan of recapitalization" to $279 million value after the "plan of recapitalization." Class A's equity position is increased from about $186 million to about $801 million, with the $615 million value transferred from the equity bearing Class B to the Class A $5 preferred, and from a fixed $100 equity value per Class A to about $430 nonfixed value per Class A. These values are as of December 31, 1972. The Class B stockholders voted in favor of this "plan of recapitalization" at the special meeting of stockholders held in Saint Louis June 15, 1973. I am a dissenter, I voted all my Class B at the special meeting in Saint Louis *against* the "plan of recapitalization." I want my Class B shares evaluated under due process of law according to the "agreed system plan" that was decided by the I.C.C. on July 29, 1954, approved and certified to the United States District Court, Eastern Division, Eastern Judicial District of Missouri which in turn was approved and certified by the U.S. District Court to the I.C.C. on February 25, 1955, making the "agreed system plan" 290 I.C.C. 477 a law of the United States. I am praying to this Honorable United States Supreme Court to have my Class B equity bearing Common shares evaluated under due process of law because I am a dissenter and I do not want to be deprived of the values of my Class B shares, according to the Constitution and laws of the United States. For this reason, petitioner James C. Gabriel, Pro Se, presents the following questions:

1. Even though the U.S. Federal District Court (S.D. N.Y. 67 Civ. 5095 (EW)) had taken jurisdiction of a class action for better dividends and conspiracy, jurisdiction being based solely on diversity, it ordered the settlement for this case for better dividends into a "plan of recapitalization" of MoPac under Section 20a through the Federal District Court judgment and opinion. What right has the Federal District Court got to force me to accept the "plan of recapitalization" to give me a value of $2,450 for each of my Class B shares when I already had voted all of my Class B shares against this "plan of recapitalization" at the special meeting of MoPac stockholders that was held on June 15, 1973, in Staint Louis. As a Class B dissenter don't I have a right under the Constitution and laws of the United States for a due process of law evaluation of my Class B MoPac Common stocks which have a value close to $22,500 per share?

2. Am I obliged to accept this so-called "plan of recapitalization" under section 20a of the Interstate Commerce Act, like the majority of the Class B stockholders did, even though I had voted against the "plan," and I am a dissenter Class B stockholder who had asked the U.S.D.C. for a due process of law evaluation of my stocks as a Constitutional right?

3. Isn't it against the Fifth Amendment and Article I, sections 9 and 10 of the Constitution of the United States when the U.S.D.C. S.D. New York refuses to allow me to have my Class B shares evaluated under due process of

law when that Hon. Court is impairing the obligations of the MoPac I.C.C. contract "agreed system plan?"

Amendment V to the Constitution of the United States provides:

> "No person shall be • • • deprived of life, liberty, or property, without due process of law • • •."

Article I, section 9 provides:

> "No bill of attainder or ex post facto law shall be passed."

Article I, section 10 provides:

> "No state shall • • • pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, • • •."

4. How in justice can a Federal District Court force me to accept the value of my Class B MoPac Common stock reduced from 82½% to 25½% and have this transferred over to the defendants-appellees Class A $5 preferred $100 value stock, now worth $430 per share, who never had filed a claim for it? This is against the *Wood* case. *Wood* v. *United States of America*, 132 F. Supp. 586 (S.D. N.Y. 1955). It is against the Interstate Commerce Act to take value from one stock and transfer it to another in a solvent company.

5. Why in the name of justice did the Honorable U.S.D.C. S.D. of New York on my appearance on March 19, 1975 in Room 706, at 11:00 A.M. tell me that my motion to have my Class B Common evaluated under due process of law according to the MoPac I.C.C. "agreed system plan" was frivolous

and that his Honor would deny me my motion as without merit when I had told his Honor that my Class B equity was being taken away from my stocks and transferred to Class A $5 preferred stockholders who had no right to it; that under the "plan of recapitalization" the U.S. Government was being short changed on $400 million undervaluation which the U.S. Government should have gotten at least capital gains taxes out of it; that Alleghany Corporation had a self interest to sell its Class B shares in order to remain as a motor carrier under the I.C.C. jurisdiction because Alleghany controlled the Jones Motor Company and as a motor carrier was able to save millions of dollars annually on I.R.S. penalty taxes; that the I.C.C. had jurisdiction over Alleghany's Class B stocks and the I.C.C. had pressured Alleghany to divest itself of MoPac shares; that Class B had a value of $22,500 per share after the $100 value per Class A has been set aside; that the MoPac I.C.C. plan of reorganization should be followed to the T because the property values in land and mineral rights had more than doubled and tripled in the last few years; that I am not a part of any class action case; that they have no right to rope me into this class action of MoPac to tell me that I have to accept this plan of recapitalization; that this class action case where a property owner has no permission from the U.S.D.C. to have his stocks evaluated under due process even if he is a dissenter against this "plan of recapitalization" is very bad for property owners in the U.S.A. because a class action could be started on one thing and then later changed into something else as is happening in the present MoPac case, without having the right to due process of law evaluation as a dissenter against the plan; that Alleghany Corporation paid millions in costs

for the MoPac I.C.C. system plan of Reorganization and that now this "agreed system plan" should be followed.

6. Why in the name of justice didn't the U. S. District Court S. D. N. Y. think of the Class B dissenters, and make exceptions for them to have their Class B shares evaluated under due process of law, even though the $2,450 value per Class B was so low a value that the Class A $5 preferred stockholders could not afford to let anyone escape from the trap set for them at such a cheap price?

7. Did the Court of Appeals below err in disregarding my plea for a due process of law evaluation according to the I.C.C. MoPac "agreed system plan" of 1954-1955, 290 I.C.C. 477, to find Class B's real true value; that Alleghany was under pressure by the I.C.C. to either sell their Class B shares, or else lose their I.C.C. motor carrier status, which saved Alleghany I.R.S. annual penalty taxes in millions of dollars, plus the fact that Alleghany was outside the jurisdiction of the S.E.C. Federal laws regarding stockholder protection, even though Alleghany controls Investors Diversified Services, Inc., the world's largest mutual fund complex, which controls nearly $7 billion in mutual fund assets, because the I.C.C. had deigned to call Alleghany a motor carrier, this company is exempt from regulation by the S.E.C.; that as a dissenter against the plan of recapitalization by voting all my Class B against this "plan" I had a right under the U. S. Constitution or laws of the United States to have my Class B equity bearing common stocks evaluated under due process of law according to the I.C.C. MoPac "Agreed System Plan" of 1954-1955, 290 I.C.C. 477; didn't the Court of Appeals below

err when on the 18th day of November, 1975, on an appeal from the United States District Court for the Southern District of New York, the U.S.C.A. decided: "This cause came to be heard on the transcript of record from the U. S. District Court for the Southern District of New York, and was argued by counsel, on consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed," even though Petitioner pro se has at all times consistently asked the Federal Courts that what he is asking for is to have his Class B equity bearing common stocks evaluated under due process of law according to the MoPac I.C.C. "agreed system plan" of 1954-1955 to find Class B real value by having the Federal Courts order the evaluation of Class B under due process of law, and in reply I am refused under due process of law evaluation of my Class B equity bearing common shares.

8. How could Alleghany truly represent petitioner when Alleghany's MoPac B stock was under trusteeship of the I.C.C. subject to the continuing jurisdiction of the Commission, and Alleghany was under I.C.C. order to divest itself of all of its B stock at any price in order that Alleghany may remain under jurisdiction of the I.C.C. as a motor carrier for business reasons, both of which factors were unknown to the Court and petitioner at the time the so-called settlement was approved by the District Court?

Rules Involved

Rule 23 of the Federal Rules of Civil Procedure:

"CLASS ACTIONS

(a) *Prerequisites to a Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

• • •

(e) *Dismissal or Compromise.* A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. As amended Feb. 28, 1966, eff. July 1, 1966."

Constitutional Provisions

Amendment V to the Constitution of the United States provides:

"No person shall • • • be deprived of life, liberty, or property, without due process of law • • •."

Article I to the Constitution of the United States provides:

Sec. 9. "No bill of attainder or ex post facto law shall be passed."

Sec. 10. "No state shall • • • pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, • • • ."

Wood v. *United States,* 132 F. Supp. 586 (S.D. N.Y. 1955)

TRANSCRIPT OF PROCEEDINGS IN THE SUPREME COURT OF THE UNITED STATES

BETTY LEVIN, *et al., Petitioners,*

v.

MISSISSIPPI RIVER FUEL CORP., *et al., Respondents.*

Nos. 352 and 359
Pages 27, 28 and 29.
WASHINGTON, D.C.
JANUARY 19, 1967

Reasons for Granting Writ

All petitioner wants is fairness and justice. He is a dissenter Class B stockholder.

Petitioner wants his Class B stockholdings in MoPac evaluated under due process for their true value.

Petitioner is a dissenter Class B MoPac stockholder who voted all of his Class B shares against the "plan of recapitalization."

The "plan of recapitalization" of MoPac calls for the arbitrary valuation of Class B, at a value of $2,450 per share as "fair value" when under due process of law the Class B has about $22,500 per share value. As a dissenter Class B shareholder, the Federal District Court did not give me the right to have my Class B evaluated under due process of law according to my constitutional rights, which is what I asked the court, to grant me that right. The Court of Appeals affirmed the order of the Southern District Court, even though I had also asked the U.S.C.A. for a due process of law evaluation according to the U. S. Constitution.

Even though the majority of Class B stockholders had voted to accept the "plan of recapitalization" under Section 20a, it is unconstitutional not to allow me as a dissenter against the "plan" who voted all his Class B against the "plan" not to have a due process of law evaluation of my Class B.

The Federal District Court (S.D.N.Y. 67 CIV. 5095) had no right to approve the "plan of recapitalization" at an arbitrary valuation of Class B at $2,450 per share when

Class B under due process of law has a valuation of about $22,500 per share, without first giving dissenters like myself the right to a due process of law evaluation for my Class B.

Petitioner is suing for himself, he does not represent a Class action for himself and others similarly situated. Therefore this case is different from previous Class action cases of other appellants.

The so called settlement or "plan of recapitalization" was far removed from the issues of the case which was for better dividends. The plan of recapitalization was a business arrangement which required petitioner and other MoPac B stockholders to accept a new unified stock of MoPac, based on an arbitrary value of their Class B equity bearing common stock, which forced their MoPac Class B equity to be reduced from 82.5% to 25.5% under the arbitrary recapitalization plan ordered by the U.S.D.C., at the same time the Class A $5 preferred equity rose from 17½% to 74.5%, which came about by the Class B values being taken over by the Class A preferred by merely calling it a "plan of recapitalization" and taking most all the values belonging to the Class B. This is clearly unconstitutional, not to be allowed to have my Class B equity bearing common stock evaluated under due process of law when I am a Class B dissenter against the "plan of recapitalization," at the same time seeing that the Class B was being denuded of most of its equity values which are being transferred to the Class A $5 preferred $100 value stock, which under the "plan of recapitalization" has reached a new value of about $430 per share and is constantly growing. These figures are as of December 31, 1972.

The court had no authority to order a recapitalization of MoPac without at the same time making it known that dissenters could have a due process of law evaluation of their Class B stocks. Recapitalization was never the issue. It was an abuse of Rule 23e of the Federal Rules of Civil Procedure. When the majority Class B accepted the "plan of recapitalization," it was the duty of the U. S. District Court S.D.N.Y. to allow dissenters like myself to a due process of law evaluation. Not to allow dissenters a due process of law evaluation is unconstitutional. It is against the 5th amendment—"No person shall be deprived of life, liberty, or property without due process of law."

It is also against Article I, section 9 and section 10.

Section 9—"No bill of attainder or ex post facto law shall be passed."

Section 10—"No state shall • • • pass any bill of attainder, ex post facto law, or law unpairing the obligation of contracts, • • • ." The "agreed system plan" of MoPac by the I.C.C. 290 I.C.C. 477 is the contract. By using the "plan of recapitalization" under 20a to transfer values from Class B to the Class A $5 preferred is without a due process of law evaluation of Class B and is impairing the obligation of contracts which is the "agreed system plan" of MoPac, a contract made by the I.C.C. and the U. S. Federal District Court in Saint Louis. It is therefore unconstitutional not to allow me as a Class B dissenter against the "plan" to have a due process evaluation of my Class B.

If the case below is not corrected so as to allow due process of law evaluations of Class B dissenters to take place, no business investor will be safe. At any time a

few of a Class can start a suit on one theory, obtain authority to represent in such a suit, and then sell out on an arbitrary price for something entirely different. No one is now safe under the present ruling by the Federal Courts.

The $2,450 value per share of Class B of MoPac was never determined by due process—jury, open hearing, etc., but was picked by the Court and plaintiff appellees for purposes of recapitalization and settlement alone.

Another Reason for Granting the Petition

Alleghany Corp., a giant corporation controlling Investor's Diversified Services Corp. was the majority holder of Class B MoPac common stock, and supposedly represented petitioner. The record will show that its own self interest prevented Alleghany from acting as a representative. The MoPac B stock of Alleghany was under the continuing jurisdiction of the Commission and Alleghany was under I.C.C. order to divest itself of its MoPac stock (*cf. Jones Motor Alleghany Corporation Control and purchase Jones Motor Co., Inc.* #MC-F-10444).

Alleghany never disclosed this self interest to the District Court or to anyone else when the so called settlement of the suit was presented and approved. The only thing disclosed was that the Franklin National Bank held Alleghany's B stock in voting trust. Months after the District Court's judgment was entered it was learned that Alleghany by I.C.C. determination, had to dump its B MoPac stock at any price, which it did at great expense to petitioner, and by depriving petitioner of his right to have his own stock properly evaluated.

In the *Wood* case—*Wood* v. *United States,* 132 F. Supp. 586 (S.D.N.Y. 1955) flatly held that if one class of stockholders tried to transfer values from one stock to another stock, under the Interstate Commerce Act, it would be unconstitutional. It cannot be done in a solvent railroad. This is exactly what the Class A $5 Preferred stockholders are doing to my Class B in this so-called plan of recapitalization.

They are transferring over $20,000 value from every Class B equity bearing common to the A $5 Preferred stocks, then converting the preferred into an equity bearing common, so that the $100 preferred now has a value of $430 per share as of Dec. 31, 1972, ending up with a common stock status on top of it all.

In the Transcript of Proceedings in the Supreme Court of the United States Betty Levin *et al.,* Petitioner v. Mississippi River Fuel Corporation *et al.,* Respondents, Cases #352 and 359, Washington, D.C. January 19, 1967 on pages 28, 29, it is brought out that dissenters cannot be held in any class action. It would be unconstitutional to hold them. This dissenter minority cannot be held. This also applies to me as a dissenter against the class action or the plan of recapitalization.

Mr. Justice Harlan: Supposing that the Class B stockholders voted in favor of the merger plan, would there by anything unconstitutional about it?

Mr. Lowenthal: If they voted in favor of it by virtue of their class vote?

Mr. Justice Harlan: By virtue of their class vote.

Mr. Lowenthal: No, it would not be unconstitutional.

Mr. Justice White: Wait a minute.

Mr. Justice Stewart: What about the dissenters?

Mr. Justice White: We didn't say 100 percent.

Mr. Justice Brennan: He said the majority.

Mr. Lowenthal: I quite agree, it would be unconstitutional as to the dissenters. It could not be done. That goes too far.

If the hypothetical vote in favor of the plan is designed to deprive a minority of what they are entitled to, then the Wood case makes perfectly clear that it is unconstitutional.

CONCLUSION

Do justice, and do not let this abuse of Rule 23(e) of the Federal Rules of Civil Procedure be used to take property rights away from citizens denying them due process of law, and the protection of their constitutionally established rights.

For class plaintiffs to start suit on one claim (and capture petitioner and others), and then deliver them up to the defendants under the pretext of settlement, to be shorn as sheep is a horrible miscarriage of justice.

This injustice is obvious by any standard. The litmus test is that petitioner and other represented Class B Mo-Pac stockholders would have been better off if their representatives had lost or dropped the dividend suit. The original suit never was intended to jeopardize, and the issues involved never jeopardized their ownership of B stock. The so-called settlement deprived petitioner of his property rights without any opportunity to have such property properly evaluated.

Review by this Court of the decision below is essential because the purpose and effect of the settlement agreement or plan of recapitalization was to destroy the Class B Common stock earnings and liquidation rights and to enrich the stockholders of Class A $5 preferred, including Mississippi River Corporation, by over $615 million values which were transferred to the Class A $5 preferred from the Class B equity bearing common without an opportunity

by me as a Class B dissenter to get a due process of law evaluation of my Class B equity bearing stocks. I ask this Hon. Court for a due process evaluation of my Class B.

Kindly grant the Writ.

Dated: Monmouth County, New Jersey
February 13, 1976

Respectfully submitted,

James C. Gabriel, Pro Se

JAMES C. GABRIEL
Petitioner Pro Se
P. O. Box 94
Sea Girt, New Jersey 08750

Certificate of Service

I, JAMES C. GABRIEL, *Pro Se,* Petitioner, do hereby certify that 3 copies each of the above and foregoing Petition for Certiorari, together with Appendix, has been deposited in the United States Mail, postage prepaid, on this the 13th day of February, 1976, to the following addressees:

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James C. Gabriel, Pro Se

JAMES C. GABRIEL, *Pro Se*
Petitioner

APPENDIX

APPENDIX A

Judgment of the U. S. Court of Appeals

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighteenth day of November, one thousand nine hundred and seventy-five.

Present:

HON. IRVING R. KAUFMAN,
Chief Judge.

HON. ROBERT P. ANDERSON,
HON. ELLSWORTH VAN GRAAFEILAND,
Circuit Judges.

75-7241

BETTY LEVIN, ALLEGHANY CORPORATION and ROBERT LEVASSEUR,

Plaintiffs-Appellees,

—v.—

MISSISSIPPI RIVER CORPORATION, MISSOURI PACIFIC RAILROAD COMPANY, ROBERT H. CRAFT, T. C. DAVIS and THOMAS F. MILBANK,

Defendants-Appellees,

JAMES C. GABRIEL,

Petitioner-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the order of said District Court be and it hereby is affirmed.

Gabriel appeals from Judge Weinfeld's order of March 21, 1975, denying a motion to set aside the final judgment of May 2, 1973 approving the settlement of this action. Each of the arguments posed by Gabriel has been previously raised and rejected in prior proceedings before the district court, this Court, the Supreme Court, or the Interstate Commerce Commission. No new evidence is presented to justify relief from the operation of the 1973 judgment. Fed. R. Civ. P. 60(b).

Although at this time we will not act pursuant to appellees' suggestion that costs be imposed upon Gabriel under F.R.A.P. 38, further appeals of this nature in a matter already so thoroughly litigated may justify the imposition of such a sanction.

IRVING R. KAUFMAN
ROBERT P. ANDERSON
ELLSWORTH VAN GRAAFEILAND

APPENDIX B

Order of the U. S. District Court

3/19/75 Petitioners Motion Is Hereby Denied.

SO ORDERED:

EDWARD WEINFELD
U.S.D.J.